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In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 425

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL AND AMOS HARRIS, JR.

Appellants

-vs-

THE STATE OF FLORIDA

Appellee

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL AND AMOS HARRIS, JR.

Appellants

-vs-

THE STATE OF FLORIDA

Appellee

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants appeal from the Order of the Supreme Court of Florida Dismissing the Appeal taken from the District Court of Appeal, First District, entered May 5, 1961, and the order

denying Petition for Re-hearing entered June 6, 1961, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that one or more substantial questions are presented.

OPINION BELOW

The order of dismissal and order denying Petition for Rehearing are not yet reported. A copy of each are attached hereto as Appendix.

JURISDICTION

This appeal was brought to review an order dated May 5, 1961, dismissing an appeal taken to the Supreme Court of Florida, from the District Court of Appeal, First District of Florida and an order entered June 6, 1961, denying a Rehearing by the Supreme Court of Florida.

Notice of Appeal was filed in the Supreme Court of Florida on the 25th day of July, 1961.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1257(2).

The Appellants, William H. "Bill" Cross, and Floyd L. Cullins were convicted for operating a Lottery and Assisting in the operation of a Lottery and the remaining Appellants were convicted of assisting in the operation of a Lottery in the Criminal Court of Record of Duval County, Florida, and sentenced to prison terms.

This case comes within the purview of the law and procedure as followed and announced in Dollree Mapp, etc., Appellant vs. Ohio, No. 236, Supreme Court of the United States, October Term 1960, June 19, 1961, 81 S.Ct. 1684.

STATUTE INVOLVED

Sections 1 and 4 of Sec. 39.02 Florida Statutes, also referred to as Sections 1 and 4 of Section 39.02 of Chapter 26,880 Laws of Florida 1951; the material portions thereof is set out below and may be found in Vol. I. Florida Statutes 1959 on page 151, and on pages 983 and 986 of General Laws of Florida for 1951.

Chapter 26880 – (No. 401)

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 154

AN ACT Relating to Juvenile Courts; Prescribing the Jurisdiction, Powers, Practice, Pleadings, Procedure, Process and Manner of Service Thereof, Officers and Employees, and Financing of Juvenile Courts and Other Courts the Name of Which Includes the Word "Juvenile"; Prescribing Exclusive Methods of Taking and Detaining Children in Custody and Prohibiting Certain Practices With Reference to Children; Providing the Qualifications, Manner of Election or Employment, Duties, Powers, Compensation, Expenses, and Tenure of Judges and Employees of Such Courts; Authorizing Levying of Taxes and Appropriations of County Funds for the Expense of Operation of Such Courts; and Repealing Inconsistent General Laws and Special Acts.

Be it Enacted by the Legislature of the State of Florida:

Section 1. Chapter 39, Florida Statutes, shall read:

. . . . . .

39.02 Jurisdiction

(1) The juvenile court shall have exclusive original jurisdiction of dependent and delinquent children domiciled, living or found within the county or district in which the court is established. The juvenile court of the county or district in which the child is found shall assume jurisdiction of the child, which jurisdiction shall be exclusive unless the judge thereof, upon approval of the judge of the juvenile court of the county or district in which is located the domicile or usual residence of the child, shall transfer the case and child to the latter court, before or after hearing, in which event the latter court, before or after hearing, in which event the latter court shall thereafter exercise exclusive jurisdiction.

. . . . . .

(4) The Judge of the juvenile court shall have the jurisdiction of a committing magistrate.

QUESTIONS

The following questions are presented by this appeal:

1. Is Florida Statute, Section 39.02 (4), as contained in Chapter 26,880, General Laws of Florida, Acts of 1951, unconstitutional or invalid under Amendment IV, V, and Section 1 of Amendment XIV of the United States Constitution and Section 16 of Article 3 and Section 22 of Declaration of Rights of the Constitution of Florida, whereby said portion purports to authorize a Juvenile Judge to exercise all powers of a committing magistrate; namely, enter alia, issue search

warrants when the title to the Act fails to include a reference thereto and nothing is contained in the title that it was meant to create another court to issue search warrants?

2. Is Florida Statute, Section 39.02 (4), as contained in Chapter 26,880, General Laws of Florida, Acts of 1951, unconstitutional or invalid under Amendment IV, V, and Section 1 of Amendment XIV of the United States Constitution and Section 16 of Article 3 and Section 22 of the Constitution of Florida, as applied to the facts and circumstances of the case at bar?

3. Did the acts of the State Officers in lowering an electronic listening device down into an air shaft from the apartment above, into the apartment that was subsequently searched, to obtain evidence that was used as a basis for probable cause for the issuance of the search warrant constitute an unlawful or unreasonable intrusion into a constitutionally protected area as condemned and defined in the case of Julius Silverman vs. United States, No. 66, decided March 6, 1961, 5 L. Ed. (2d) 734, 81 S. Ct. 679?

4. Did the conduct of the State Officers in procuring the slips, adding machines and other personal property from the apartment of Cross that were placed in evidence by the prosecution violate Amendment IV, Amendment V and Section 1 of Amendment XIV of the United States Constitution and Section 22 of the Declaration of Rights of the Florida Constitution?

5. Whether or not Appellants were denied the substantial right, as given under the VI Amendment of the Constitution of the United States, to be confronted by the witness when their request to examine a memorandum used by a witness during the trial was denied?

6. Whether or not the Supreme Court of Florida, and the District Court of Florida, First District, by their respective failures to render an opinion setting forth whether or not the alleged confessions or admission given or made by Appellants Harris and Carswell preclude this Court from causing due inquiry to be made with respect thereto and is a per curiam decision or dismissal of the appeal a denial of their rights under the Vth Amendment and Section 1 of the XIV Amendment of the United States Constitution?

7. Whether or not the admissions or confessions of Appellants Harris and Carswell, given in evidence over their objections, were freely and voluntarily given and was the consideration thereof by the jury a denial of their rights under Amendment V and Section 1 of the XIV Amendment of the United States Constitution, and also their arrest, search and seizure under the Fourth Amendment of the United States Constitution?

8. Whether or not Appellants were denied a fair trial and due process as guaranteed by the V, VI and XIV Amendments of the United States Constitution and Sections 11 and 12 of the Declaration of Rights of the Florida Constitution by reason of the denial of Motions for Severance by the trial court based upon statements allegedly made by one or more of Appellants that implicated other Appellants, said statements not having been made during the existence or in furtherance of a conspiracy and within the rule as announced in Paoli vs. U. S., 352 U. S. 232, 1 L. Ed (2d) 278, 77 S. Ct. 294?

STATEMENT OF THE CASE

The Appellants were convicted in the Criminal Court of Record of Duval County for offenses against the lottery laws. As a basis for obtaining evidence of probable cause for the issuance of a search warrant, under which evidence was seized and used in the trial, an electronic listening device was lowered down an apartment air shaft into an air shaft of the apartment where some of the Appellants were found when arrested and from which the physical evidence was seized. Appellants contend this was a physical intrusion into a constitutionally protected area and their rights were violated. Also, that a Florida Juvenile Judge is without authority to issue search warrants.

Appellants Harris and Carswell made confessions or admissions that were received in evidence over their objections and it is their claim their rights were violated under Amendment V and Section 1 of the Fourteenth Amendment of the United States Constitution and that their arrests and detention during which the statements were given rendered these statements inadmissable in evidence.

The points referred to above were raised in the trial court by Motion to Quash Search Warrant (R. 877-880) and Motion to Quash Search Warrant and Suppress Evidence (R. 889-893), and additional Grounds of Motion to Quash Search Warrant and Suppress the Evidence (R. 907) and specifically therein it was charged the search violated the 4th and 5th Amendments and all were denied. These points were reviewed in Motion for New Trial (R. 910-916), appropriate objections to the search and seizure and the alleged confession were made during the trial and overruled.

In addition to the foregoing Appellants were denied the right to examine a memorandum used during the trial to refresh the memory of a witness, request therefor having been duly made (Vol. II P. 540, 555, 557-58, 561-562) in violation of the VI Amendment of the right to be confronted by witnesses.

Appellants filed Motions for Severance (R. 894-900) and asked for and were denied a separate trial. The statements made by Harris and Carswell after their alleged illegal arrest and detention implicated or tended to implicate Cullin and Cross and were received in evidence over their objections. This was a denial of the right to be confronted by a witness and right to cross examine. R. 482-83-88).

Each of the foregoing points were raised by Motion for New Trial (R. 910-916) in the trial court and by Assignment of Errors (R. 924-932) in the District Court of Appeal, First District. By Per Curiam decision the judgment of the lower Court was affirmed without comment (R. 956).

These points were again assigned as error (R. 965-967) in the Florida Supreme Court. The appeal therein was dismissed (R. 976). In the Petition for Re-hearing to the Supreme Court of Florida the holding on March 6, 1961, in Silverman v. U. S. 5 L. Ed. (2d) 734, 81 S. Ct. 679, with respect to a physical intrusion into a constitutionally protected area as well also the denial of confrontation of a witness and other matters were presented and not withstanding such was denied (R. 980).

The Supreme Court of Florida and The District Court of Appeal, First District failed or refused to write any opinion on any of the questions raised.

THE QUESTIONS ARE SUBSTANTIAL

Primarily this case is based on a challenge to the legality of a search and seizure of articles allegedly being used in a lottery operation. It is urged, the search of the apartment containing an air shaft into which an electronic listening device was lowered and the seizure therein of said articles was illegal; that the arrest of those appellants found therein, and of Harris and Carswell were illegal and all statements made by them inadmissable; that said Juvenile Judge acted under Sections of Chapter 26,880 of Florida Law 1951, to-wit, Sections 1 and 4 of Section 39.02 and that said sections are unconstitutional because the title to said act fails to contain a provision authorizing issuance of a Search Warrant by such official. Section 16 of Article III, Constitution of Florida provides "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith which subject shall be briefly expressed in the title," . . . and that no probable cause existed as a basis for the search warrant as a matter of fact nor was such shown in the affidavit therefor.

Appellants contend the said Section 16 of Article III of the Constitution of Florida has been violated in that the said Juvenile Court law mentions nothing in the title to the act about the issuance of search warrants and that provisions read into the act, where the Legislature gave the Juvenile Court the right to bind over a Juvenile offender to another court for trial is not reasonably susceptible to the construction that it was meant to create another Court or authorize another Court or official to issue search warrants.

In Silverman vs. United States, No. 66, decided March 6, 1961, 5 L. Ed (2d) 734, 81 S. Ct. 679, it was held that the

placement of an electronic listening device into physical contact with a portion of the defendant's house or office – the heating system, an integral part of the premises occupied by him, for obtaining information was in violation of the Fourth Amendment to the United States Constitution. In the instant case the device was lowered down an air shaft 93 inches from an apartment above into the air shaft of the raided apartment. (R. 1015-1018). The facts in the instant case will reveal there was a physical intrusion and even more so than in the Silverman case.

In the case of Dollree Map, etc. Appellant vs. Ohio, No. 236, October Term 1960, 81 S. Ct. 1684, June 19, 1961, being an appeal, it was held that all evidence obtained by searches and seizures in violation of the Constitution is enforceable against the States.

Appellants Harris and Carswell urge their arrest, questioning and evidence obtained as a result thereof were done in violation of Amendment V and Section 1 of the XIV Amendment of the United States Constitution. No probable cause existed for the stopping of the automobile in which they were riding nor had either committed an act in the presence of the officers that warranted their arrest without a warrant. (Vol. II P. 422-427) (P. 432). They were not carried promptly before a committing magistrate and formal charges preferred, nor were they arraigned promptly.

Statements of Carswell and Harris were received in evidence, though made subsequent to the raid and arrest of Appellants and made in the absence of the other Appellants. By the denials of the Motions for Severance and Trial of the defendants jointly the other Appellants were denied confrontation of witnesses and cross examination in violation of Amendment VI of the Constitution of the United States.

The foregoing constitute substantial questions as they relate to encroachments or violations of one's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The Florida Supreme Court, and The District Court, First District have declined to rule on any and all of the questions presented, all of which were raised and urged.

A State may not avoid deciding a Federal question, Wolfe vs. State of N. C. 80 S. ct. 1482.

The position of the State of Florida is set forth in its Brief filed in the Florida Supreme Court (R 1045), by the assertion,

> "Moreover, the citation of U. S. authorities in alleged support of such a claim is unthinkable and of no effect whatever in as much as procedure in the Courts of Florida is not in the slightest to be governed by any Federal law cases or otherwise" . . .

Thus it has been successfully argued in the applicable appellate Courts that the cited provisions of the United States Constitution may be ignored when the liberty of an accused is at stake.

CONCLUSION

For the foregoing reasons an order noting probable jurisdiction should be entered or in the alternative this appeal be treated as a Petition for Writ of Certiorari and a writ issued accordingly.

Respectfully submitted,

A. K. Black
P. O. Box 527
Lake City, Florida

Attorney for Appellants

CERTIFICATE OF SERVICE

I Hereby Certify that six copies of the foregoing Jurisdictional Statement were furnished to Honorable Richard W. Ervin, Attorney General of the State of Florida, Tallahassee, Florida, by U. S. Mail on the day of September, A. D. 1961.

Attorney

APPENDIX

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1961

FRIDAY, MAY 5, 1961

WILLIAM H. "BILL" CROSS, FLOYD L. CULLENS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL, and AMOS HARRIS, JR.

Appellants,

vs.

STATE OF FLORIDA

Appellee.

This cause having this day been considered, it is ordered ex mero motu that the appeal entered in this cause in the District Court of Appeal of Florida, First District, on October 3, 1960, be and the same is hereby dismissed.

A True Copy

TEST:

Guyte P. McCord
Clerk Supreme Court.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1961

TUESDAY, JUNE 6, A. D. 1961

WILLIAM H. "BILL" CROSS,
FLOYD L. CULLINS,
LYMAN GAGE REYNOLDS,
ALLEN CARSWELL and
AMOS HARRIS, JR.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee

On consideration of the Petition for Rehearing filed by Attorneys for Appellants,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

(SEAL)

A true copy,

TEST:

GUYTE P. McCORD
Clerk Supreme Court.

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ORDER OF MAY 5, 1961, DISMISSING APPEAL IN THE ABOVE CAUSE)

Office-Supreme Court, U.S.
FILED
DEC 26 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

NO. 425

OCTOBER TERM, 1961

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

RESPONSE TO QUESTION THREE

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

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IN THE

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NO. 425
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WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,
Appellants,

-vs-

STATE OF FLORIDA,
Appellee.

RESPONSE TO QUESTION THREE

Question three as posed by appellants at page 5 of their jurisdictional statement reads as follows:

> "3. Did the acts of the State Officers in lowering an electronic listening device down into an air shaft from the apartment above, into the apartment that was subsequently searched, to obtain evidence that was used as a basis for probable cause for the issuance of the search warrant constitute an unlawful or unreasonable intru-

> sion into a constitutionally protected area as condemned and defined in the case of Julius Silverman vs. United States, No. 66, decided March 6, 1961, 5 L.Ed. (2d) 743, 81 S. Ct. 679?"

Though it is impossible to determine from a reading of this Court's opinion in the *Silverman* case, supra, just what a "constitutionally protected area" is, one well may conclude that, at least in the *Silverman* case, supra, it was the heating duct which served exclusively the house occupied by Silverman, et al.

For the very same reason that this Court, in the *Silverman* case, supra, found no need to reconsider its previous decisions (ostensibly *On Lee v. United States*, 1952, 343 U.S. 747, 751, 72 S.Ct. 967, 96 L.Ed. 1270; *Goldman v. United States*, 1942, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322; *Olmstead v. United States*, 1928, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944), so here there is no need (because of the obvious difference in factual circumstances) to examine into the question of a constitutionally protected area past the points to be made in support thereof, post.

It clearly appears that a more detailed word picture as to the factual circumstances surrounding the condemned intrusion in the *Silverman* case, supra, may be gleaned from the dissenting opinion of Circuit Judge Washington. See *Silverman v. U.S.*, 275 F. 2d 173, 178-180. Admittedly, said dissenting

opinion is the most damning with reference to the acts perpetrated by the District of Columbia police officers. Painting their activities in their worst possible light, the following appears to have transpired:

> "The police gained entrance—quite legally—to the row house next to that occupied by appellants. They then carefully probed the brick party wall between the two houses in search of an advantageous spot for the insertion of their eavesdropping device—a needle or spike about twelve inches long, connected to an amplifying circuit. The testimony indicated that the spike, in order to serve its purpose adequately, had to come in contact with a solid object capable of resonance. Mere insertion in the plaster or brick of the wall would be ineffective. The desired sound reception was obtained by inserting the spike about seven inches into the party wall, under the baseboard, at a point where the wall contained the metal heating duct for appellants' house. The heating duct was an excellent vibrator, and furthermore ran into the bedroom as well as the living room of appellants' house. Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants. The spike was the conductor by which sounds in appellants' house were transmitted to the amplifier in the adjoining house. Conversations on both floors of the appellants' house were clearly heard by the police through earphones attached to the amplifier."

From the above as well as the specific pronouncement of this Court in its order and opinion reversing the Court of

Appeals, it appears conclusively that the heating duct, which furnished the sounding board by means of which the "spike-mike" could so admirably function, was a self-contained unit serving no structure other than the house which Silverman et al. occupied. To get to it, and perforce touch it with the mike in question, the officers had to penetrate the party wall separating the two structures. It is this penetration with the attendant contact of the mike with the heating duct *in appellants' house* that this Court condemned as an actual unlawful intrusion into a constitutionally protected area.

In order that this Court reach its condemning opinion, it had to conclude that the heating duct in question constituted a constitutionally protected area. With this Court's opinion in the *Silverman* case, supra, appellee has no quarrel whatever. However, appellants' effort to enlist *Silverman v. U.S.*, supra, in aid of their conclusions is, in appellee's view, entirely unwarranted.

This is so because of the salient difference between the common ventilating shaft employed by the agents in the instant case—it being one serving the entire St. Johns Apartments—and the single unit heating duct system used to advantage by the police officers in the *Silverman* case, supra. The heating duct in the *Silverman* case, supra, was part and parcel of the house in which Silverman's activities were carried on. Not so in the instant case. Any right appellants might seek to claim in the common ventilating system in this case is one shared by every tenant in the building in much the same way they share their rights in the respective hallways, stairwells and other passages of ingress and egress. Indeed, if it were large enough it could

logically be said that the common ventilating shaft was available to every tenant for any use not inconsistent with either the terms of his leasehold or the purposes for which the property was let by the lessor. To be sure, it being limited in size so as to preclude any use such as that suggested above, said common ventilating shaft was a passage for air to each and every (jointly and severally) one of the tenants lawfully in the building.

Though there is no evidence whatever in the record in the case at bar to demonstrate that in fact appellants' rental rights gave them any rights whatever in said common ventilating shaft, even if it be conceded arguendo (the only way appellee might) that they in fact had some degree of a possessory interest therein, it was, appellee respectfully submits, an interest shared by each and every other tenant indivisibly. Therefore, it is folly to suggest that even this may be characterized as a "constitutionally protected area."

Just as the hallways of the Shoreham Hotel in Washington, D. C., are not a part and parcel of the rights inuring to the roomers there, so in this case the hallways could not so be styled. Just like the Shoreham Hotel's duct work provides warmth in the winter and refrigerated air in the summer, it does not become the property of any given roomer, except insofar as it provides them with that beneficial service, so here the common ventilating shaft was, except for the service it provided the several tenants, if anybody's property, the lessors'.

If the above rationale should be in any way deemed defective, the following result must come about, to-wit: if a lawfully occupying tenant in an apartment several stories above that of a suspect's (as well as laterally distant from him) were to remove the grid from the ventilating shaft that entered his apartment and simply place a powerful pick-up microphone inside the duct-work (according to appellants—their duct-work), whatever his microphone had picked up would in fact be useless as evidence on the theory that it was obtained by an invasion of the privacy of a constitutionally protected area. Such a result, though seemingly possessed of logic is, of course, not only impossible but indeed incredulous, for no illegal intrusion whatever was made because the suspicious tenant had a right in the duct-work not in the least subservient to that of the suspected tenant.

If, on the other hand, appellants would argue that their possessory interest in said duct-work was limited to the physical perimeter necessary to serve their particular apartment, then one wonders just how other tenants in that same building could secure ventilation from that restricted and private area. This, of course, is where the head of the monster must fall, to-wit: might this not be likened to the case of an outside fire escape? Since the outside fire escape is physically attached to each apartment it serves, one might argue that the tenant rents or leases that too. Yet, who would argue that the very purpose for which it is designed, erected and maintained is to serve all the tenants? We think that no one could, in good conscience, argue that point. By the same token, we respectfully submit that there is not one scintilla of difference in principle

between the fire escape illustration and the common ventilating shaft here involved.

At first blush it might be said (certainly appellants do) that this case falls squarely within the purview of this Court's condemnation in the *Silverman* case, supra. Perhaps conversely, an objectively inclined and totally disinterested third party might urge that the factual situation here fell neither within the *Silverman v. U.S.*, supra, case, nor within *Goldman v. U.S.*, supra, but rather somewhere in between. To be sure, if this were so, it well might require this Court to render an opinion covering those particulars, inasmuch as its opinions in the *Silverman*, *On Lee*, *Goldman* and *Olmstead* cases, supra, do not in fact limn the question. However, no such judicial labors can honestly be said to be necessary here.

Equating the fire escape illustration set out ante with that of the "detectaphone" employed in the *Goldman* case, supra, it does appear that the conclusion of absolute mirror images must follow—the respective areas from which the intelligence was gleaned being public and private; neither one of which caused an illegal invasion of the suspect's own privacy.

Collocating this Court's reasoning in *Olmstead v. U.S.* supra, wherein it said:

> "'There was no entry of the houses or offices of the defendants.' 277 U.S. at 464. Relying upon these circumstances, the Court reasoned that '[t]he intervening

> wires are not part of (the defendant's) house or office any more than are the highways along which they are stretched.' 277 US, at 465."

with the (by now) obvious fact that this ventilating shaft could not be, by any stretch of the imagination, considered a part of appellants' apartment any more than was a segment of said ventilating shaft located several stories above and to the rear of their apartment; one must conclude that even that guiding principle (*Olmstead v. U.S.*, supra) has far more applicability here than would the *Silverman* case, supra, at any given time.

When placed in juxtaposition to this Court's opinion in *On Lee v. U.S.*, supra, wherein, it was said:

> "'. . . no trespass was committed.' The agent went into the petitioner's place of business 'with the consent, if not by the implied invitation, of the petitioner.' 343 US, at 751, 752."

one is compelled to note (by dint of negative comparison) the controlling aspect set out therein of the case at bar, to-wit: the agents in the *On Lee case*, supra, were lawfully in the premises either with the consent or by the implied invitation of On Lee—here, since no ownership, custody, interest, control, or other form of possession of said common ventilating shaft was vested in the appellants, no consent or implied invitation by the appellants could conceivably have been given the investigating officers. Indeed none was necessary.

Just as this Court must agree that a tenant in an apartment building whose emergency egress is assured by virtue of a physically attached external fire escape over which no tenant has any control, interest or custody (which is not that of every tenant), so here the Court must conclude that a tenant in the St. Johns Apartment building whose ventilating needs are served by virtue of a common ventilating shaft has no control, interest, or custody (which is not that of every tenant) over said common ventilating shaft.

CONCLUSION

So it is that when viewed in the light of the above, it follows as the night the day that in fact and truth the area in question was not, is not and well may never become the "constitutionally protected area" contemplated by this Court in the *Silverman* case, supra. This being so, it further follows that this appeal should be dismissed, or, if it be considered as a petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Question Three to the Honorable A. K. Black, Attorney at Law, Lake City, Florida, by mail, this ____ day of December, 1961.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.

In the
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OCTOBER TERM, 1961

No. 425

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee

REPLY TO RESPONSE TO QUESTION THREE

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FEDERAL COMMUNICATIONS ACT

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 425

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee

REPLY TO RESPONSE QUESTION THREE

Appellants submit Appellee, in its Response to Question Three, fails to come under any of the grounds for dismissal as prescribed by Rule 16.(b) of the Rules of the Supreme Court of the United States.

Appellee, (p. 4 of Response to Question Three), seeks to distinguish the case of Silverman v. U. S., 5 L. Ed (2d) 743,

81 S. Ct. 679, 275 F 2d 173, factually, with the case under consideration. Appellants contend the facts are so similar the rule announced in the Silverman case applies.

The air shaft had the feature of privacy. If this were not true why was it necessary, in order to pick up sounds from Apartment 607, to enter into and utilize Apartment 707 and the shaft leading therefrom? The shaft wherever it ran was for tenants only. No tenant in the absence of evidence to the contrary, nor even the landlord, could admit another to the privacy of an apartment. In the recent case of Chapman v. U. S., 5 L. Ed. 828, 365 U. S. 610, 81 S. Ct. 776, it was held that even a landlord could not authorize the entry of officers to make a search and seizure of premises. Certainly a neighbor tenant could not authorize such.

The vents in the apartments were part and parcel of each apartment. They were individual as such. These vents are the most relevant of all the facts. It was through its existence and use, together with the electronic device, that constitutional guarantees were violated.

The listening device was lowered 93 inches to the vent of Apartment 607. The evidence does not reveal that any sounds could have been, or were picked up, from any place other than 607. The Court commented, (Vol II, p. 547), there was no testimony it could not pick up sounds from another source. It is obvious the comments overheard definitely came from Apartment 607 because the officer who signed the affidavit for search warrant so asserted. Had the shaft or vent been so common as a hall way, it would have been impossible to determine from which the sounds came.

It is not deemed necessary to reply to the comments relative

to the Shoreham Hotel or that pertaining to fire escapes. These are not pertinent to the pending question.

The following pertinent quotes are made of the evidence, all of which relate to the pending question, to-wit:

Vol. I, p. 293:

"Q What did you do?

A With the assistance of Special Agent Smilgin I located an air shaft.

Q You can use this diagram here if you wish. At the time you went to Apartment 707 on October 17, 1958, did you take any equipment with you?

A Yes, sir.

Q What?

A A Magnecord recording device and miscellaneous tools and wires and a battery and a carbon microphone. I believe that's all.

Q What did you do with that equipment in 707?

A This is the living room of the apartment and this is the kitchinette area and this location approximately five feet from the floor is an opening to an air shaft and I removed the grille from that air shaft and dropped a wire with a"

Vol I, p. 294:

"microphone on it down the air shaft ninety-three inches and attached this wire -- the opposite end from the microphone and recording device in such a way it would receive sounds."

Vol I, p. 295:

"Q Now, I believe you said you attached a microphone?

A Yes.

Q What was the length of the cord? How far down the shaft was it?

A Ninety-three inches from the bottom edge of the grating that I opened.

Q That was in Apartment 707?

A Yes, sir.

Q In other words, from the head of the microphone in the air shaft it was ninety-three inches?

A Yes.

Q For what purpose was it lowered ninety-three inches?

A I arrived at the ninety-three inches dimension because of measurements I made in 707. I measured from the ceiling of 707 to the top edge of the grat-

ing and measured the width of the grating and the bottom of the grating to the floor and measured twelve inches for the thickness of the floor.

Q Then in what position was the microphone after being lowered ninety-three inches as you testified?

A Opposite the air shaft in Apartment 607.

Q In other words, after putting the microphone on the wire and dropping it ninety-three inches, it was in front of the same grating in front of 607? In the apartment immediately below?

In front of the grating in Apartment 607 immediately"

Vol I, p. 296:

"below?

A Yes, sir.

Q Could you hear sounds emanating from 607 on that microphone as installed by you?

A Yes, I could hear sounds emanating from that microphone to indicate it was live."

to which objection was made, (p. 568, 569):

"COURT: The proffered testimony here of this witness concerning what he heard over the earphones.

MR. MYERSON: The defendants object and move to strike all the testimony of the witness Smilgin relative to anything he may have heard over any mechanical device, whether it was a microphone or tape recorder, for the following reasons: One, it is in violation of Section 12 and 22 of the Declaration of Rights of the State Constitution; two, it is in violation of the fourth and fifth amendments in the Federal Constitution; three, in violation of 605 of the Federal Communications Act; four, it is in violation of Section 822.10 of the Florida Statutes, that the use of the mechanical device whether a microphone or tape recorder -- that the witness has projected himself into the privacy of Defendant Cross' room and it was a violation of privacy."

CONCLUSION

It is re-submitted and urged the use of the electronic device to obtain evidence used as a basis for procurement of a search warrant violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

A. K. BLACK
P. O. Box 527
Attorney for Appellants

I hereby certify that six copies of ~~the~~ the foregoing ~~Jurisdictional Statement~~ were furnished to Honorable Richard W. Ervin, Attorney General of the State of Florida, by U. S. Mail on the 10th day of January, 1962.

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In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 425

WILLIAM H. BILL CROSS,
FLOYD E. CULLINS, LYMAN
GAGE REYNOLDS, ALDEEN
CARSWELL and AMOS HARRIS, JR.,

Appellants,

STATE OF FLORIDA,

Appellee.

RESPONSE TO COURT

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Appellants,

vs.

STATE OF FLORIDA,

Appellee

RESPONSE TO COURT

In response to the request that Appellants respond to the following:

> "Do the decision of the Supreme Court of Florida, dated May 5, 1961, and its order denying the Petition for rehearing dated June 6, 1961, or either of them, rest on an independent non-federal ground adequate to support judgment of that Court?"

The following is submitted:

Appellee questions the steps taken by Appellant in filing an Appeal from the District Court of Florida, First District, to the Supreme Court of Florida and from the Supreme Court of Florida to the United States Supreme Court and contends neither of the Florida Courts construed a controlling provision of either the Florida or Federal Constitution. Appellee (R. 1030) tactfully admits Appellants "May well have raised constitutional issues, both state and federal, both of the Courts below, (particularly the District Court of Appeals) merely affected an application; as opposed to either passing upon the validity of or construing a constitutional provision." It thus certainly follows, the Court by its orders dated May 5, 1961, and order denying Petition for Re-hearing dated June 6, 1961, decided the raised questions, adversely to Appellants or declined to pass upon the Constitutional question. In either event, there is a valid legal basis for and this Court should examine the facts and determine whether or not the use of the electronic listening device in invading the privacy of the apartment by means of a physical penetration, violated constitutional guarantees.

Appellants respectfully represent that at no time did the Supreme Court of Florida or the District Court of Appeals, First District, Florida, ever render an opinion in said case, nor did it put forward any ground of decision, for it to determine if that Court had rested its judgment on an independent nonfederal ground. Consequently, there is no way in which Appellants can ascertain legal reasons for the dismissal of the Appeal taken to the Supreme Court from the District Court of Appeals, First District, on May 5, 1961, and the Supreme Court's denial of a Re-hearing on June 6, 1961, thus avoiding the federal constitutional question raised at the

trial of said case in the Criminal Court of Record, Duval County, Florida, and again raised on Appeal to the District Court of Appeals, First District, State of Florida, and in the Supreme Court of Florida.

In the case of Wolfe v. State of North Carolina, 364 U. S. 177, 185, 80 S. Ct. 1482, 1487, (1960) this Court held that:

> "A state court may not avoid deciding federal questions and thus defeat jurisdiction of United States Supreme Court by putting forward nonfederal grounds of decision which are without any fair or substantial support."

It may correctly be assumed the Supreme Court of Florida considered the Petition for Re-hearing (R 977) in which it was urged the Supreme Court and the District Court either failed, refused, or neglected to properly consider the facts of the case and their relation to Julius Silverman v. United States, case No. 66, decided March 6, 1961, 5 L. Ed. (2d) 734, 81 S. Ct. 679, as to the search and seizure, as cited therein, and in addition thereto, the following Federal Constitutional questions. Socony-Vacuum Oil Co. v. United States, 310 U. S. 150, at page 233, and as cited in the case of Morris v. United States, (CCA 5th) 149 F. 123, 126, as to a denial of the right of confrontation under Article VI of the United States Constitution, the procurement and admission into evidence of the alleged confessions of Harris and Carswell and whether or not the denial of the Motion for Severance in the light of statements made by some of the defendants, and which statements were received in evidence against other defendants, was a denial of guaranteed rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

On June 8, 1961, Application was made to the District Court of Appeal, First District, for leave to file another Petition for Re-hearing setting out the Silverman case, supra, and this was also denied without comment. This occurred after the Supreme Court of Florida denied the Petition for a Re-hearing and is therefore not a part of its record.

It has been inferred Appellants misconceived the remedy in filing a Petition for Writ of Certiorari in the Supreme Court of Florida, in order to review the action of the District Court, wherein the trial court was affirmed. Appellants contend that in order for the facts to be reviewed by the Supreme Court of Florida, an Appeal is the only remedy.

Certiorari is an original action in the sense that the subject matter of the suit or proceeding which it brings before the Court are not there reinvestigated, tried and determined upon the merits generally as upon an appeal. State v. Smith (1960 Florida App.) 118 So. 2d 792. In the case of Lake vs. Lake, 103 So. 2d 639, it is reflected that two Appeals are not contemplated; that the Court will not go behind a Per Curiam Affirmance with an undefined "possible exception." However, in the case of Dean vs. Deas, 116 So. 2d 23, the Supreme Court apparently went behind a Per Curiam Affirmance, and re-evaluated the case.

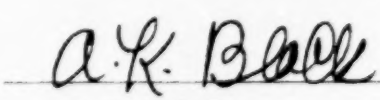
Certiorari is a discretionary writ. Gottlieb vs. Surfside, (1959 Fla App.) 115 So. 2d 25. Appellants contend they had a right to Appeal wherein a provision of the Florida or Federal Constitution is to be construed with respect to a search and seizure. It is said in Engel v. North Miami, (1959 Fla) 115 So. 2d 1, that Appeals will lie to it, where Constitutional Provisions have been construed.

In the case of Blackburn vs. State of Alabama, 354 U. S. 393, 77 S. Ct. 1098, where the record reflects there is an uncertainty as to whether or not the Alabama Court of Appeals passed on defendant's claim to protection under the Due Process Clause of the Fourteenth Amendment, the judgment was vacated and remanded in order that the Court might pass on such claim.

CONCLUSION

The Appellants contend that the federal grounds upon which the reversal is sought here, have been presented to the Appellate Courts of Florida and the orders referred to, dated May 5, 1961, and June 6, 1961, are based on federal grounds that were considered by the Courts.

Respectfully submitted:



A. K. Black
P. O. Box 527
Lake City, Florida

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that six copies of the foregoing were furnished to Honorable Richard W. Ervin, Attorney General of the State of Florida, Tallahassee, Florida, by U. S. Mail on the 15th day of March, A. D. 1962.

A. K. Black

Attorney

Office Supreme Court, U.S.
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IN THE

Supreme Court of The United States

NO. 425

OCTOBER TERM, 1961

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Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

RESPONSE TO ISSUE OF EXISTENCE OF INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT OF THE SUPREME COURT OF FLORIDA

RICHARD W. ERVIN
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Assistant Attorney General

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IN THE

Supreme Court of The United States

NO. 425

OCTOBER TERM, 1961

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

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RESPONSE TO ISSUE OF EXISTENCE OF INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT OF THE SUPREME COURT OF FLORIDA

Appellee contends and will demonstrate that the Supreme Court of Florida in dismissing appellants' appeal by its order of May 5, 1961, and denying rehearing on June 6, 1961, had adequate state grounds upon which to so rule.

The Court's attention is invited to its recent decision in the case of *Durley v. Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds;

they being respectively statutory *res adjudicata* (*Section 79.10, Florida Statutes*) and substantive or case law *res adjudicata* (*Washington v. Mayo*, (Fla.), 77 So. 2d 620, 621).

That either or both of the bases for the application of that doctrine by the Supreme Court of Florida was an adequate state ground in this Court's view needs no further saying.

In the instant proceedings we are concerned neither with a statutory pronouncement nor with a case law interpretation of any principle of state law, but rather with the highest form of law to which one can turn in the State of Florida; a constitutional provision, to-wit: *Article V, Section 4 (2)*, the pertinent provisions of which read as follows:

"§ 4. *Supreme Court*

* * *

"(2) *Jurisdiction*

* * *

"Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. * * *"

The matter quoted above, was adopted as a constitutional amendment in the general election held on November 6, 1956, to take effect on July 1, 1957. By its

advent, the people of the State of Florida approved the precise manner and mode in which all litigants must seek appellate review in the Supreme Court of Florida. This effectively supplanted all other means by which that review could theretofore be secured. At this writing, the procedure delineated therein remains inviolate.

The appellants specifically elected to seek review in the Florida Supreme Court by *appeal* under and by virtue of what they contend is a vested right assured them by *Section 4 of the Declaration of Rights of the Florida Constitution,* to-wit:

> "§ 4 *Courts to be open; remedies guaranteed*
> "Section 4. All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, *by due course of law,* and right and justice shall be administered with out sale, denial or delay." (Emphasis supplied)

The phrase "*by due course of law*" has been discussed by the Supreme Court of Florida in the case of *State ex rel. Gore v. Chillingsworth*, 126 Fla. 645, 171 So. 649, 654. From a reading of the *Chillingsworth* case, supra, it does not take any stretch of judicial reason to quickly determine that that portion of the Bill of Rights of the Florida Constitution upon which appellants would found their right to appeal merely contemplates that due process of law guarantees to every citizen the right to have only that course of legal procedure which has been established in our judicial system for the protection and enforcement of their rights

It should be clear that *Section 4*, supra, neither says nor contemplates that litigants who feel themselves aggrieved by some judicial pronouncement are free to run helter-skelter to any court that may happen to suit their fancy with a cavalier disregard for a constitutional amendment which specifically spells out not only when and if but as well, where an appeal shall be perfected.

The provisions of *Article V, Section 4 (2)*, supra, are a constitutional commandment created by the citizens of the State of Florida binding on everyone touched thereby in every sense of the word. The article in question deprives no one of review no matter what his circumstances—it rather brings into focus that which theretofore may have been nebulous. Its pertinent provisions spell out the precise bases upon which a litigant aggrieved by a decision of a district court of appeal may seek review in the Florida Supreme Court (specifically by appeal).

In appellee's stand before the Florida Supreme Court, we noted that it could not be urged (indeed appellants specifically did not) that the district court of appeal (by its per curiam affirmance) initially passed upon the validity of a state statute.

We further contended that it could not be urged (indeed appellants specifically did not) that the district court of appeal (by its per curiam affirmance) initially passed upon the validity of a federal statute.

We further contended that it certainly could not be urged (indeed appellants specifically did not) that the

district court of appeal initially passed upon the validity of a federal treaty. Appellee here notes that no federal treaty is in anywise connected with any aspect of this case from its birth to this date.

En fine, we contended that it certainly could not be urged (indeed appellants specifically did not) that the district court of appeal (by its per curiam affirmance) initially construed a controlling provision of either the Florida or Federal Constitution.

So it was that appellants were faced with the constitutional requirement impressed upon them (*Article V, Section 4 (2)*) that required a specific assertion that either of the several enumerated prequisites in fact occurred (of course supported by record evidence thereof) in order to secure review in the Florida Supreme Court by appeal. That they have not done that which all litigants must do who seek such review is, we submit, beyond cavil.

Having so failed, it is almost idle to suggest that appellants were free to seek that same review by appeal under the alleged aegis of *Section 4 of the Declaration of Rights*, supra, upon the mythical theory that this bit of writing was a niche into which aggrieved litigants could stuff themselves if they were so unfortunate as to be unable to bring themselves within the well-ordered confines of *Article V, Section 4 (2)*, supra.

As was stated before the Florida Supreme Court, perhaps the most alarming aspect of the position appellants

would have this Court believe justified a review of their grievances by the Supreme Court of Florida (on appeal) is their claim that since they had raised what they believed were adequate questions touching upon both the federal and state constitutions that they had an absolute right to have the trial court and/or the district court of appeal pass upon those questions in precisely the manner necessary to justify them in seeking the review in question.

They further contended that simply because neither of the aforementioned courts either found it necessary or chose to pen such words as would justify a review by appeal, they should not have been precluded from receiving that which they might have had if either of said courts had elected or found it necessary to do any of the things required by the constitutional amendment before the Florida Supreme Court would grant review by appeal. We contended then and do now that this is a classic example of the tail wagging the dog.

The record furnished this Court by appellants and particularly their pleadings and brief in support of their position demonstrates an absolute failure to prove, claim, allege or even show any interest in a review of the district court's per curiam opinion under the appropriate provisions of *Article V, Section 4 (2)*, supra. That such specifics are absolutely required in order to seek review by appeal in the Florida Supreme Court is beyond question. With reference to this purely procedural constitu-

tional requirement setting out the jurisdiction of the Florida Supreme Court to review district courts of appeal by appeal, it can be said that the Florida Supreme Court has, from time to time, been required to edify the bar of the State of Florida by repetitious and occasionally exhaustive opinions anent the point.

Certainly the most penetrating is the case of *In Re Kionka's Estate*, (Fla.), 121 So. 2d 644; an illuminating opinion wherein the Florida Supreme Court determines the circumstances under which it can and will review (on appeal) a decision of a district court of appeal. In so doing, it merely recites and interprets purely Florida law governing appellate procedure in this state. To substantially the same effect are the cases of *State v. Furen*, Fla., 118 So. 2d 6; *Engel v. City of North Miami*, Fla., 115 So. 2d 1; *Bluesten v. Florida Real Estate Commission*, Fla., 125 So. 2d 567; and *City of Miami Beach v. State*, Fla., 111 So. 2d 437, 438.

Appellee notes that in the *City of Miami Beach* case, supra, the Florida Supreme Court said the following:

> "Upon consideration of the matter and an examination of the record and briefs in said causes, we fail to find that the subject decision of the District Court of Appeal initially passed upon the validity of any of the statutes and that, therefore, this Court is without jurisdiction to entertain the appeal and the same is hereby dismissed *ex mero motu*." (Emphasis supplied)

This Court should quickly note that that is precisely the disposition which the Florida Supreme Court made of appellants' appeal.

Based on the matters set out above with reference to the constitutional requisites imposed on litigants seeking a review by appeal in the Florida Supreme Court, it is respectfully submitted that the human imagination could not envisage a situation with less legitimate basis for seeking review by appeal than that which appellants lamely presented to the Florida Supreme Court.

Returning to this Court's decision in the *Durley* case, supra; we find the legal fiction of *res adjudicata* as embodied in *Section 79.10*, supra, and Florida case law, to-wit: *Washington v. Mayo*, supra, neither one of which being possessed of the stature of a constitutional amendment; was considered by this Court as an adequate state ground upon which the Florida Supreme Court could summarily dismiss Durley's petition for habeas corpus.

It is therefore certainly no departure and indeed not even a step forward to conclude that the compulsion of a constitutional amendment prescribing just how Florida litigants in Florida cases involving Florida law (federal law only incidently as it may be raised) shall proceed to seek review in the Supreme Court of Florida by appeal.

The almost basic English pronouncements of *Article V, Section 4 (2)*, supra, do not present an obtuse writing incapable of being deciphered. No mystical qualities attach to it nor is it shrouded in doubt. It is simply a mandatory requirement which applies without exception to all who seek to come thereunder. Ergo, the Supreme Court

of Florida in dismissing the appeal in this cause merely took notice of a complete failure or, as the case may be, refusal, by or on behalf of appellants to proceed in conformity therewith.

Nor need this Court consider that the Supreme Court of Florida *might* have rested its order of dismissal on an adequate state ground as was the case in *Durley v. Mayo*, supra. It may be categorically stated and appellee so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

If it be urged (appellants do not) that the Florida Supreme Court should have treated their futile attempt at appeal as a petition for certiorari, there is perhaps even less basis upon which they may complain here. The appropriate section of *Article V, Section 4 (2)*, supra, carefully and clearly delineates the procedure to be followed by litigants seeking certiorari review in the Florida Supreme Court from a decision of a district court of appeal. That provision reads as follows:

"§ 4. *Supreme Court*

* * *

"(2) *Jurisdiction.*

* * *

". . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of

another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

At the outset, appellee deems it appropriate to acknowledge that the district court of appeal rendered a per curiam decision (affirmed) without opinion. On the several occasions wherein the Florida Supreme Court has been asked to review by certiorari a per curiam affirmance without opinion they have, almost without exception, consistently refused to extend such review for a multitude of reasons, all of them constitutionally embedded.

A pungent rejection of appellate liberality in cases where certiorari review was sought of a per curiam decision without opinion, was rendered by the Florida Supreme Court in the case of *Carmazi v. Board of County Commissioners*, (Fla.), 104 So. 2d 727. Mr. Justice Drew, specially concurred, quoted from the case of *Thompson v. State*, 199 Ga. 250, 33 S.E. 2d 903, and concluded that the construction contemplated by our Constitution (*Article V, Section 4 (2)*—as quoted above) did not include the mere application of facts to constitutional provisions, but rather required such construction as would at least touch on the meaning of some provision of the Constitution directly in question—precisely what neither the trial court nor the district court of appeal in this case were required to or did in fact do.

Without regard to the number of times this Court may read appellants' pleadings seeking appeal in the

Florida Supreme Court, appellee proclaims that nowhere within the confines of that portion of the record could one divine (intelligently, that is) any claim, whether accurate or otherwise, which would comport with the specific requirements of *Article V, Section 4 (2)*, supra

It should be clear that a per curiam decision without opinion such as appellants sought to have reviewed by the Florida Supreme Court did not affect a class of constitutional or state officers. It should be equally clear that that same decision did not pass upon a question certified by said district court of appeal to be of great public interest. It seems inconceivable that appellants could possibly urge that said decision was in direct conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same point of law.

These jurisdictional prerequisites which must be alleged in a well-drawn petition intentionally requesting certiorari, if said petition is to be considered by the Florida Supreme Court, are at least as necessary to, and in fact are prerequisites imposed on parties improvidently seeking review in that court by appeal. To hold otherwise would invite mislabelled or misdirected appellate pleadings thereby requiring the Florida Supreme Court to not only read the entire record but conclude for the appellant what he should have said in order that it in turn could consider whether to grant a particular form of review. Again this becomes a case of the tail wagging the dog.

Appellee is not yet acquainted with any judicial pronouncement in this land which requires the highest state

court to plead correctly for appellants who were represented by well-qualified and able counsel (at one stage of the proceedings, five attorneys) who specifically elected or refused as the case may be, to proceed in the manner directed by the Constitution of the State of Florida

---

There are a host of cases in which the Supreme Court of the State of Florida has justified declining to review a per curiam decision of a district court of appeal by certiorari. The first of these is the case of *Lake v. Lake*, Fla., 103 So. 2d 639. The decision in the *Lake* case, supra, should be dispositive of this aspect of the matter before this Court. The principle announced by the *Lake* case, supra, is ably supported by the Supreme Court's opinion in the case of *South Florida Hospital Corporation v. McCrea* Fla., 118 So. 2d 25, 27, when it said the following:

> "At the risk of being tedious, we will again reiterate that unless we find a conflict in decisions of other appellate courts of this state on the point or points of law pronounced in the opinion of the District Court of Appeal in this case, we have no power or jurisdiction in any manner to disturb the judgment of the lower court. Courts of Appeal are and were meant to be courts of final appellate jurisdiction in the vast majority of cases, and in cases such as the one at bar it is only to harmonize and standardize decisions that this court may presume to interfere. As said by Mr. Justice Thomas in Lake v. Lake, supra:
>
> " 'Sustaining the dignity of the decisions of the district courts of appeal must depend largely on

> the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case'.
>
> "We therefore initially refrain from scrutinizing the action of the trial court or of the Court of Appeal as to the effect on the parties to the cause. If what was decided finds no contradiction in what this court or another District Court has said in their official pronouncements on the same point or points of law, then our authorized examination is complete and the writ of certiorari will be discharged. If there is contradiction we will undertake to resolve the conflict."

See also *Ansin v. Thurston*, Fla., 101 So. 2d 808; *Seaboard Airline Railroad Company v. Branham*, Fla., 104 So. 2d 356, and *Hakam v. City of Miami Beach*, Fla., 108 So. 2d 608.

So it is that appellants; confronted with the unequivocal notation of the district court of appeal rendered on July 26, 1960, as follows:

"PER CURIAM.

Affirmed."

were constitutionally bound to follow the specific requirements of *Article V, Section 4 (2)*, in seeking only that review to which they were in fact entitled. Viewed within the framework of the certiorari which they never sought, it can be said, based upon the above, that they

could make no legitimate claim for review in that fashion. Certainly their pleadings could never be said to have limmed the specific requirements of the aforesaid constitutional amendment with reference to appeals from the district courts of appeal.

Unless this Court should elect to nevertheless consider the search and seizure question involved on the theory that its decision might be a decided boon to the bench and bar of the entire nation (considering the apparent void which exists between the cases of *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 and *Silverman v. United States*, 365 U.S. 505, 5 L.Ed. (2d), 743, 81 S.Ct. 679), it is respectfully submitted that the Supreme Court of Florida dismissed the appeal in this cause on a most adequate state ground.

Moreover, though it did not elect to consider the improperly labeled pleadings as a petition for certiorari, that decision as well was founded upon an eminently adequate state ground. (See citations ante)

Inasmuch as the petition for rehearing introduced no material even remotely capable of altering the hopeless deficiencies for which only appellants may be held responsible, every position heretofore assumed by appellee with reference to the adequacy of the state grounds upon which the Supreme Court of Florida clearly and correctly ruled as it did, is of equal applicability to said petition for rehearing.

CONCLUSION

The proceedings pursuant to which appellants seek this Court's intercession should, if they be characterized an appeal—be dismissed; if characterized a petition for writ of certiorari—be denied; and the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing appellee's Response to Issue of Existence of Independent Non-federal Ground Adequate to Support Judgment of the Supreme Court of Florida to the Honorable A. K. Black, Attorney at Law, Lake City, Florida, counsel for the appellants, by mail, this ..... day of March, 1962.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.

FILED
APR 21 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 425

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee

PETITION FOR REHEARING

A. K. BLACK
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Attorney for Appellants

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Appellants,

vs.

STATE OF FLORIDA,

Appellee

PETITION FOR REHEARING

The Petitioners, William H. "Bill" Cross, et als, by their counsel respectfully request this Court to grant a re-hearing, or further hearing herein, in this cause and assign the following grounds therefor:

1. The rule as announced in the case of *Staub v. Baxley*, 355 U. S. 313, 2 L. ed 2d 303, 78 S. Ct. 277, is applicable to the cause under consideration and especially the following excerpts therefrom, to-wit:

Page 309:

> ". . . Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Whether the constitutional rights asserted by the appellant were ". . . given due recognition by the (Court of Appeals) is a question as to which the (appellant is) entitled to invoke our judgment, and this (she has) done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."

In American Bar Association Journal, January, 1962, Volume 48, Number 1, on page 62, it is said . . "The Supreme Court divided as to its proper application. Note 38," referring the case cited above, *Uphaus v. Wyman*, 364 U. S. 388; and *Wolfe v. North Carolina*, 364 U. S. 177.

2. The attention of the Court is directed to an intervening circumstance of a substantial nature. This relates to the rendition of the case and opinion in *Harris Leveson, Jr. v. State*

of Florida, 138 So 2d 361, District Court of Appeal, Third District of Florida, March 1, 1962, (#61,512), in which the State of Florida has therein recognized and announced that the case of *Jones v. U. S.*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed 697, shall be accepted in Florida as authority that one may attack a search and seizure when not the owner of the place searched. It is to the effect one may do so when he is an aggrieved party. This decision is in conflict with *Tribue v. State*, 106 So 2d 630, District Court of Appeal, Second District (1958), to the effect one must prove himself the owner of the premises.

The foregoing two cases, to-wit: *Harris Leveson, Jr. v. State of Florida*, 138 So 2d 361, District Court of Appeal, Third District of Florida, March 1, 1962, (#61,512), and *Staub v. Baxley*, 355 U. S. 313, 2 L. ed 2d 303, 78 S. Ct. 277, are substantial and not previously cited and counsel respectfully urged these should be considered.

Respectfully submitted,

A. K. BLACK
P. O. Box 527
Lake City, Florida

Attorney for Appellants

CERTIFICATE

Undersigned counsel certifies this Petition is presented in good faith, not for delay and said Petition is restricted to the specified grounds.

A. K. BLACK
Attorney for Appellants

SERVICE OF PETITION

A. K. Black, attorney for Petitioners, certifies that a copy of the foregoing Petition for Re-hearing was furnished to Honorable Richard W. Ervin, Attorney General, Tallahassee, Florida, on this the ——— day of April, 1962.

Attorney